IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re Enron Corporation Securities Litigation	§	
Mark NEWBY, et al.,	§	
Plaintiffs,	§	Civil Action No. H-01-3624 (Consolidated)
v.	§	CLASS ACTION
ENRON CORP., et al.,	§	
Defendants.	§	

OPPOSITION OF DEFENDANT ARTHUR ANDERSEN LLP AND INDIVIDUAL ANDERSEN DEFENDANTS TO PLAINTIFFS' MOTION TO PRECLUDE THE FILING OR PRODUCTION OF DOCUMENTS SUBJECT TO A PROTECTIVE ORDER

Defendant Arthur Andersen LLP ("Andersen") and defendants Michael L. Bennett, Joseph F. Berardino, Donald Dreyfus, James A. Friedlieb, Gary B. Goolsby, Gregory W. Hale, Michael D. Jones, Benjamin S. Neuhausen, Richard R. Petersen, John E. Stewart, William E. Swanson, Thomas H. Bauer, Debra Cash, D. Stephen Goddard, Jr., Michael Lowther, Michael C. Odom, Nancy A. Temple, and Roger D. Willard (the "Individual Andersen Defendants") respectfully submit the following Memorandum of Law in Opposition to Plaintiffs' Motion to Preclude the Filing or Production of Documents Subject to a Protective Order.

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The entry of a protective order is a means of facilitating discovery while providing protection for any confidential or sensitive information and is routine in complex litigation. Plaintiffs' motion to preclude such an order is not only premature given that discovery is currently stayed pursuant to the Private Securities Litigation Reform Act of 1995, but inconsistent with efficient adjudication and recognized practice. Indeed, protective orders are intended to expedite discovery and to provide all parties with a layer of appropriate protection against disclosure of information that will unnecessarily cause undue annoyance, embarrassment or oppression.

ARGUMENT

I. Entry of a Protective Order Will Facilitate Discovery and is Standard Practice in Complex Litigation

Federal Rule of Civil Procedure 26(c) specifically provides for the use of protective orders in the administration of pretrial discovery and the Manual for Complex Litigation, Third, expressly endorses the use of protective orders in cases of this type.[1]

> "Complex litigation will frequently involve information or documents a party may consider sensitive . . . .
> When the volume of potentially protected materials is large, an umbrella order will expedite production, reduce costs, and avoid the burden on the court of document-by-document adjudication."

Manual for Complex Litigation, Third, § 21.432 (2000). Relying on the Manual for Complex Litigation, courts have also recognized the advantages of the umbrella order approach over the document-by-

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[1]The form of order proposed by Certain Defendants is typical. This particular type of order, referred to as an "umbrella" order, provides "that all assertedly confidential material disclosed (and appropriately identified, usually by stamp) is presumptively protected unless challenged. The orders are made without a particularized showing to support the claim for protection, but such a showing must be made whenever a claim under an order is challenged." Manual for Complex Litigation, Third, § 21.432 (2000). What the Manual for Complex Litigation labels an "umbrella" order is referred to by Plaintiffs and some courts as a "blanket" protective order. (See Pl. Br. at 18.)

document method. See, e.g., United Nuclear Corp. v. Cranford Ins. Co., 905 F.2d 1424, 1427 (10th Cir. 1990); In re Alexander Grant & Co. Litig., 820 F.2d 352, 356 (11th Cir. 1987); Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1122-23 (3d Cir. 1986). A protective order in a case like this one, involving a large exchange of documents, "is designed to encourage and simplify the exchanging of large numbers of documents, volumes of records and extensive files without concern of improper disclosure.... History has confirmed the tremendous saving of time effected by such an approach." Alexander, 820 F.2d at 356; see also United Nuclear, 905 F.2d at 1427 ("No doubt such an order makes the discovery process in a particular case operate more efficiently").

In stark contrast to this type of practical proposal, Plaintiffs have categorically refused to entertain any form of protective order to ensure orderly discovery.[2] However, Plaintiffs' claims concerning a right of public access to pretrial discovery materials are completely without merit. The common law right of public access upon which Plaintiffs purportedly rely "does not extend to information collected through discovery which is not a matter of public record." Id. at 355; see also SEC v. TheStreet.com, 273 F.3d 222, 232 (2001) ("documents that play no role in the performance of Article III functions, *such as those passed between the parties in discovery*, lie entirely beyond" the reach of the presumption of public access) (internal quotations and citation omitted) (emphasis in original). Indeed, discovery is generally

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[2]In the event this Court denies Plaintiffs' motion to preclude the entry of a protective order, Plaintiffs urge this Court to review each document designated as deserving confidential treatment before such treatment is extended. In a case of this magnitude, the document-by-document method is extremely time consuming and costly such that it is totally impracticable. See Cipollone, 785 F.2d at 1123; see also United Nuclear, 905 F.2d at 1427 ("protracted disputes over every item of sensitive information" cause undue and avoidable expense and delay). Indeed, Andersen is only one of several institutional defendants, and it alone has collected billions of pages in connection with the Enron matter and anticipates producing millions of pages of documents given the breadth of Plaintiffs' discovery requests.

"conducted in private as a matter of modern practice," and information exchanged during discovery is not "a traditionally public source of information." Seattle Times Co. v. Rhinehart, 467 U.S. 20, 33 (1984). No one can deny the considerable interest the public has taken in the Enron-related litigation. Nevertheless, "[a]lthough information exchanged in pretrial discovery would often generate considerable public interest if publicly disseminated, private litigants have protectable privacy interests in confidential information disclosed through discovery." Alexander, 820 F.2d at 355; see also Seattle Times, 467 U.S. at 35 (holding that one of the purposes of Rule 26(c) is to prevent damage to reputation and to preserve privacy). Moreover, "the assurance of confidentiality may encourage disclosures that otherwise would be resisted." United Nuclear, 905 F.2d at 1427. Even so, the type of protective order required by defendants to protect legitimate privacy and confidentiality interests will not shroud this litigation in secrecy as Plaintiffs would have this Court believe, but merely will prevent the widespread dissemination of information that warrants confidential treatment and will facilitate more speedy discovery.[3]

II. Identifiable Categories of Confidential and Personal Information That Will Be Subject to Discovery Warrant Entry of a Protective Order

The need for a protective order is not theoretical and based merely on the fact that such orders have been used in other unrelated complex cases. In Retirement Systems of Alabama v. Merrill Lynch & Co., Case No. CV 2002-738-H, currently pending in the Circuit Court of Montgomery, Alabama State

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[3]To promote judicial economy and avoid burdening the Court with duplicative briefs, Andersen and the Individual Andersen Defendants hereby adopt the arguments set forth in Certain Defendants' Response in Opposition to Plaintiffs' Motion to Preclude the Filing or Production of Documents Subject to a Protective Order and the Bank Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion to Preclude the Filing or Production of Documents Subject to a Protective Order. There are, nonetheless, a few additional issues which warrant attention and are addressed herein.

Court, another securities fraud action arising out of Enron's collapse, the court entered a stipulated protective order, which highlights the propriety of entering such an order in this case.[4] In addition, Andersen is already aware of several categories of documents that require specific protection.

A. Personal Information

"Under the law of procedure, parties and related persons often have no choice but to divulge information they would not otherwise freely share." Word of Faith World Outreach Center Church, Inc. v. Morales, 143 F.R.D. 109, 113 (W.D. Tex. 1992). In this regard, Plaintiffs have revealed their intention to seek discovery of private personal information concerning both parties and non-parties, including individual bank records, tax returns, personal diaries, appointment books and calendars, as well as personnel files. "To allow a party to use that information for purposes unrelated to the litigation and in a manner which harms the giver of that information is abusive, and courts have a significant interest in preventing such usage." Id. Entry of a protective order will prevent abuse and at the same time make confidential information available for appropriate purposes related to the litigation.

Several courts have recognized that there exists "a strong public policy against the public disclosure of personnel files." See Cason v. Builders Firstsource-Southeast Group, Inc., 159 F. Supp. 2d 242, 247 (W.D.N.C. 2001). Although courts have permitted discovery of personnel files where relevant, such

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[4]Certain Defendants have submitted a proposed protective order in response to Plaintiffs' motion, while the Bank defendants have argued that the Court should defer entering a protective order until the motions to dismiss are decided. Andersen agrees that, although the Alabama protective order and the order proposed by other defendants serve as very helpful guidance, it is premature to enter such an order because the Court's decision on the motions to dismiss will, no doubt, affect the ultimate form a protective order should take in this case. For instance, Andersen's concern regarding personal information may be allayed should the Individual Andersen Defendants be dismissed from the case, as they should, because Plaintiffs do not contest that the personal information of non-parties should be kept confidential and be subject to a protective order.

discovery is generally subject to an appropriate protective order limiting the use of the documents to the litigation and the dissemination of such documents. See id.; accord Poseidon Oil Co., L.L.C. v. Transocean Sedco Forex, Inc., Nos. Civ. A. 00-760, Civ. A. 00-2154, Civ. A. 01-2642, 2002 WL 31098543, at *1 (E.D. La. Sept. 18, 2002); Davis v. Precoat Metals, No. 01 C 5689, 2002 WL 1759828, at *4 (N.D. Ill. July 29, 2002); Chauvin v. Sheriff Harry Lee of Jefferson Parish, No. Civ. A. 99-2200, 2000 WL 567006, at *3 (E.D. La. May 8, 2000). Personnel files deserve some level of protection because they "might contain highly personal information such as an individual's unlisted address and telephone number, marital status, wage information, medical background, credit history... and other work-related problems unrelated to Plaintiff's claims." Knoll v. American Telephone & Telegraph Co., 176 F.3d 359, 365 (6th Cir. 1999); see also Province v. The Pep Boys–Manny, Moe and Jack, No. Civ. A. 99-2162, 2000 WL 420626, at *2 (E.D. Pa. April 12, 2000) ("Disclosure of the information in the personnel records and benefits file would violate the privacy interests of the former and present employees in their non-public salaries, benefits, and other such personal information contained in the personnel files").[5]

The same rationale applies to other categories of private financial and personal information. For example, "tax returns are highly sensitive documents and are not routinely subject to discovery." Credit Cheque Corp. v. Zerman, No. Civ.A.3:97-CV-1967-G, 1998 WL 7123, at *1 (N.D. Tex. Jan. 7, 1998). Accordingly, when discoverable, disclosure of tax returns may be conditioned on entry of a protective

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[5]In addition to conditioning discovery of personnel files on entry of a protective order, oftentimes highly personal information, including social security numbers, addresses, telephone numbers, medical history, credit information and tax information, is redacted or removed prior to production. See, e.g., Davis, 2002 WL 1759828, at *4; Chauvin, 2000 WL 567006, at *3; Cannon v. Lodge, No. Civ. A. 98-2859, 1999 WL 600374, at *1 (E.D. La. Aug. 6, 1999).

order. See id.; see also Alexander, 820 F.2d at 354 (affirming entry of protective order authorizing parties to designate as confidential, *inter alia*, tax returns).

It is well settled that courts have respected and preserved the confidentiality of information contained in personnel files and similarly private information relating to individuals' financial and private affairs. Indeed, in their proposed order, Plaintiffs seek this traditional protection for themselves. There is no justification for the public dissemination of intimate details concerning the private affairs of both parties and non-parties alike that are merely exchanged as part of pretrial discovery. The entry of a protective order will provide basic and widely accepted protection for this type of information. The openness of and access to the Enron-related proceedings will not be compromised by insuring against the needless exposure of personal information.

B. Privileged and Non-Enron-Related Information

The size of the anticipated document production, the broad scope of Plaintiffs' document requests and the short discovery deadlines create the danger of inadvertent production of documents containing information protected from disclosure by the attorney-client privilege, attorney work product doctrine and other statutory and common law privileges.[6] The Manual for Complex Litigation, Third provides guidance in this regard:

> "In complex litigation involving voluminous documents, privilege documents are occasionally produced inadvertently. The parties may stipulate, or an order may provide, that such production shall not be considered a waiver of privilege and that the party receiving such a document shall return it promptly without making a copy."

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[6]Although the Fifth Circuit Court of Appeals has rejected a *per se* rule of waiver in such situations, the effect of inadvertent disclosures remains subject to a case-by-case review. See Alldread v. City of Grenada, 988 F.2d 1425, 1434 (5th Cir. 1993).

Manual for Complex Litigation, Third, § 21.431 (2000). The protective order contemplated by Certain Defendants and the order entered in Alabama both include standard provisions to this effect.

A related issue, which is addressed in both the proposed order submitted by Certain Defendants and the Alabama order, concerns documents relating to Andersen clients that are in no way related to Enron, to whom Andersen owes ethical, contractual and statutory duties to keep their information confidential. See Checkosky v. S.E.C., 23 F.3d 452, 486, n. 23, n. 25 (D.C. Cir. 1994) ("Of course accountants also owe duties to their clients, such as keeping confidential information confidential."). Section 901.457 of the Texas Occupations Code, for instance, establishes a qualified accountant-client privilege and specifically provides that an accountant "may not voluntarily disclose information communicated to the [accountant] by a client in connection with services provided to the client by the [accountant], except with the permission of the client or the client's representative." Tex. Occ. Stat. § 901.457(a).[7] Texas law also creates an ethical duty for accountants to keep communications from their clients confidential. Tex. Admin. Code tit. 22, § 501.75 ("Except by permission of the client or the authorized representatives of the client, a certificate or registration holder or any partner, officer, shareholder, or employee of a certificate or registration holder [issued by the Texas State Board of Public Accountancy] shall not voluntarily disclose information communicated to him by the client relating to, and in connection with, professional services rendered to the client by the certificate or registration holder. Such information shall be deemed confidential."). And, although there are exceptions to these rules for disclosures made pursuant to a court order and certain summonses, the directive must mention the client by name and request specific

[7]The Texas statute simply codifies and illustrates the well established duty a licensed accountant owes to preserve the confidentiality of information received from its clients for the purposes of providing accounting services that otherwise derives from common law ethical, fiduciary and contractual obligations.

information concerning that client. See, e.g., Tex. Occ. Stat. § 901.457(b)(2). Information concerning any other clients must remain confidential.

Many of the people from whom Andersen has collected documents worked for multiple clients including Enron and, in some instances, Andersen has collected documents relating to clients other than Enron. There are also some documents that contain both responsive information relating to Enron and non-responsive information relating to clients other than Enron. Given the size of the Andersen collection, the extremely broad scope of Plaintiffs' discovery demands and the short discovery deadlines in this case, it may be unavoidable that some of this information pertaining to other clients will be included in productions in this action.

Although Andersen will endeavor to minimize the production of information pertaining to clients other than Enron, a protective order that provides protections in the event of inadvertent production is necessary to prevent the disclosure of confidential information pertaining to uninvolved third parties. Cf. McCurdy v. Wedgewood Capital Management Co., Inc., No. Civ. A. 97-4304, 1998 WL 961897, at *3 (E.D. Pa. Dec. 31, 1998) (granting protective order to redact names of defendant's clients who had no part in events at issue in litigation); In re Sahlen & Assocs., Inc., No. 89-6308-CIV-HOEVELER, 1990 WL 284508, at *2 (S.D. Fla. Nov. 5, 1990) (same). In the absence of a protective order that addresses inadvertent production of privileged or otherwise protected documents, the flow of discovery will be severely slowed given that defendants will have no guarantee of protection in the case of an inadvertent disclosure and thus will not be able to utilize various tools that would streamline the review and production of documents.

CONCLUSION

For the foregoing reasons, as well as for the reasons set forth in Certain Defendants' Response to Plaintiffs' Motion to Preclude the Filing or Production of Documents Subject to a Protective Order and the Bank Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion to Preclude the Filing or Production of Documents Subject to a Protective Order, Plaintiffs' motion to preclude the filing of a protective order should be denied.

Dated: Houston, Texas
October 15, 2002

Respectfully Submitted,

Rusty Hardin by A Ramzel with permission.

Rusty Hardin
State Bar No. 08972800
S.D. Tex. I.D. No. 19424

RUSTY HARDIN & ASSOCIATES, P.C.
1201 Louisiana, Suite 3300
Houston, Texas 77002
(713) 652-9000
(713) 652-9800 (fax)

Attorney-in-Charge for
Defendant Arthur Andersen LLP, Michael L. Bennett, Joseph F. Berardino, Donald Dreyfus, James A. Friedlieb, Gary B. Goolsby, Gregory W. Hale, Michael D. Jones, Benjamin S. Neuhausen, Richard R. Petersen, John E. Stewart and William E. Swanson

OF COUNSEL
Andrew Ramzel
State Bar No. 00784184
S.D. Tex. I.D. No. 18269
RUSTY HARDIN & ASSOCIATES, P.C.

Daniel F. Kolb
Sharon Katz
DAVIS POLK & WARDWELL
450 Lexington Avenue
New York, New York 10017
(212) 450-4000
(212) 450-3633 (fax)

Scott B. Schreiber by A. Rangel with permission.

Scott B. Schreiber
(*admitted pro hoc vice*)

ARNOLD & PORTER
555 Twelfth Street, N.W.
Washington, D.C. 20004
(202) 942-5000
(202) 942-5999 (fax)

Attorney-in-Charge for
Defendant Thomas H. Bauer

OF COUNSEL
John C. Massaro
Justin S. Antonipillai
ARNOLD & PORTER

Clayton C. Cannon
State Bar No. 03745200
Fed. So. Dist. 13686
STUMPF CRADDOCK MASSEY & PULMAN
1400 Post Oak Blvd., Suite 400
Houston, Texas 77056
(713) 871-0919
(713) 871-0408 (fax)

Billy Shepherd by [signature] with permission.
Billy Shepherd
State Bar No. 18219700

CRUSE, SCOTT, HENDERSON & ALLEN, LLP
600 Travis Street, Suite 3900
Houston, Texas 77002-2910
(713) 650-6600
(713) 650-1720 (fax)

Attorney-in-Charge for
Defendants Debra A. Cash, D. Stephen Goddard, Jr.,
Michael M. Lowther, and Michael C. Odom

OF COUNSEL
Dennis H. Tracey
David Wertheimer
Brad M. Johnston
HOGAN & HARTSON L.L.P.
875 Third Avenue
New York, New York 10022
(212) 918-3000
(212) 918-3100 (fax)
Counsel for Debra A. Cash

Michael Warden
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
(202) 736-8711 (fax)
Counsel for D. Stephen Goddard, Jr.

Gary A. Orseck
Lawrence S. Robbins
ROBBINS, RUSSELL, ENGLERT, ORSECK & UNTEREINER LLP
1801 K Street, N.W.
Suite 411
Washington, D.C. 20006

(202) 775-4500
(202) 775-4510 (fax)
Counsel for Michael M. Lowther

Peter Fleming, Jr.
Eliot Lauer
Benard V. Preziosi
CURTIS, MALLET-PREVOST, COLT & MOSLE LLP
101 Park Avenue
New York, New York 10178
(212) 696-6000
(212) 697-1559 (fax)
Counsel for Michael C. Odom

Mark C. Hansen by
with permission.

Mark C. Hansen
(*admitted pro hoc vice*)

KELLOGG, HUBER, HANSEN, TODD &
EVANS, P.L.L.C.
1615 M Street, N.W. Suite 400
Washington, D.C. 20036
(202) 326-7900
(202) 326-7999 (fax)

Attorney-in-Charge for
Defendant Nancy A. Temple

OF COUNSEL
David E. Ross
KELLOGG, HUBER, HANSEN, TODD
& EVANS, P.L.L.C.

Clayton C. Cannon by
Clayton C. Cannon A. Lang with permission.
STUMPF CRADDOCK MASSEY & PULMAN
State Bar No. 03745200
1400 Post Oak Blvd., Suite 400
Houston, Texas 77056
(713) 871-0919
(713) 871-0408 (fax)

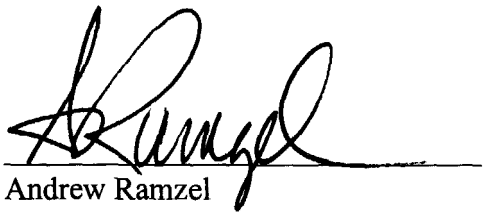
Attorney-in-Charge for
Defendant Roger D. Willard

OF COUNSEL
Amelia Toy Rudolph
SUTHERLAND ASBILL & BRENNAN LLP
999 Peachtree Street, NE
Atlanta, Georgia 30309-3996
(404) 853-8000
(404) 853-8806 (fax)

Neil S. Lang
SUTHERLAND ASBILL & BRENNAN LLP
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2415
(202) 383-0100
(202) 637-3593 (fax)

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of October, 2002, the foregoing pleading was served on the counsel of record according to the Court's orders in this matter.



Andrew Ramzel